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No. 85-684

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JUDITH KRAMER,
Petitioner,
v.
BOONTON EDUCATION ASSOCIATION and
NEW JERSEY EDUCATION ASSOCIATION,
Respondents.

JUDITH KRAMER,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF BOONTON and
NEW JERSEY PUBLIC EMPOYMENT RELATIONS COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the New Jersey Supreme Court was correct in concluding that the New Jersey Employer-Employee Relations Act is not facially unconstitutional because it authorizes a union to expend representation [*i.e.*, agency] fees, over objection, for "lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer."

2. Whether the New Jersey Supreme Court was correct in concluding that the New Jersey Employer-Employee Relations Act is not facially unconstitutional because it fails to require a *pre*-collection governmental determination of the amount of the representation fee that may be charged to objecting employees.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Boonton Education Association, New Jersey Education Association and Board of Education of the Town of Boonton, submit that the Petition for a Writ of Certiorari should be denied, and file this brief in opposition to the Petition.

STATEMENT OF THE CASE

A. This case involves a constitutional challenge to the facial validity of certain provisions of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-2, *et seq.* (New Jersey Act), which is the statute that regulates New Jersey's public sector labor relations. The New Jersey Act authorizes a public employer and the union that has been selected as the majority representative of its employees to include in their collective bargaining agreement a provision requiring employees who are covered by the agreement, but who choose not to join the union, to pay "a representation fee in lieu of dues for services rendered by the" union. N.J.S.A. 34:13A-5.5a.[1] This representation fee may not exceed 85% of regular membership dues. N.J.S.A. 34:13A-5.5b. Additionally, nonmembers have the right to demand and receive from the union the return of any part of their fee that would be expended for "activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment." The Act expressly provides, however, that the returnable amount need not include:

> the costs of support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer. N.J.S.A. 34:13A-5.5c.

Under the New Jersey Act, a union is entitled to receive representation fees only if it "has established and maintained a demand and return system which provides

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[1] Although this type of cost-sharing arrangement is most commonly referred to as an "agency fee", the precise terminology used to describe it varies from jurisdiction to jurisdiction (*e.g.*, "fair share fee", "service fee", etc.). Because it is referred to as a "representation fee" in New Jersey, we use that designation here.

pro rata returns" to objecting employees of the amount that otherwise would be used for "nonchargeable" expenditures. The system must provide for "review of the amount returned through full and fair proceedings placing the burden of proof on the majority representative," and "an appeal to a board consisting of three members to be appointed by the Governor, by and with the advice and consent of the Senate . . ." *Id.* The decisions of this board in turn may be appealed to the state courts.

At issue in this case are the provisions of the New Jersey Act that (1) authorize the use of representation fees, over objection, to defray the costs of the specified employment-related lobbying, and (2) regulate the demand and return systems.

B. The New Jersey Supreme Court used two basic guidelines in defining its decision-making function in this case. The Court stated first that it considered both aspects of petitioner's challenge "to be directed to the facial validity of the statute. . . ." App. 13a.[2] Second, in assessing the facial validity of the challenged provisions, the court indicated that its "clear duty is to construe the statute in a manner that would uphold its constitutionality if it is reasonably susceptible to such a construction." App. 17a.

Dealing first with the lobbying issue, the New Jersey Supreme Court construed the New Jersey Act as authorizing the use of representation fees, over objection, *only* for lobbying activities that are "germane to policy goals in collective negotiations and contract administration or to advantages in wages, hours, and other condi-

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[2] As far as the lobbying issue was concerned, the court below noted that "[t]he record before us does not permit consideration of the precise manner in which the statutory authorization to collect and expend the representation fee was implemented." App. 13a-14a. With regard to the second issue, "the Court was advised at oral argument that the . . . demand-and-return system introduced into evidence has since been terminated and replaced with a new demand-and-return system, which is not part of the record." *Id.*

tions of employment," App. 28a, and held that this statutory authorization "is not facially invalid since it furthers the State's significant interest in public-employment stability without encroaching impermissibly on the rights of free speech and association that are protected by the first amendment to the United States Constitution . . . ." App. 29a. The court added that "[i]n the context of this facial challenge to the Act, we do not now attempt to forecast the various objectives of lobbying activities that will or will not meet this standard." App. 28a.

The New Jersey Supreme Court then turned to the facial validity of the statutory provisions regulating demand-and-return systems. Focusing specifically on the first amendment concern expressed by this Court in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Ellis v. Railway Clerks*, 104 S.Ct. 1883 (1984), the court below concluded that the requirements for demand-and-return systems expressly set forth in the New Jersey Act itself, as "[s]upplemented by the procedural safeguards that we have determined are required to achieve the legislative purpose of the Act," App. 34a, are sufficient to prevent the unconstitutional use of the fees of objecting employees during the pendency of challenges to the amount collected. Accordingly, the court sustained the facial validity of the challenged provisions, and since their facial validity was the only issue, it made no attempt to "decide in advance what refinements may be required to" achieve a statutorily acceptable demand-and-return system, noting simply that "any challenges to such systems must be measured by the standards imposed by the statute as construed here." App. 34a.

REASONS FOR DENYING THE WRIT

The New Jersey Supreme Court made two constitutional rulings in this case: (1) a union may use representation fees, over objection, to help finance the employment-related lobbying specified in the New Jersey Act,

and (2) under the statutory provisions regulating demand-and-return systems, as construed, it is possible for a union to develop a constitutionally adequate system. Neither of these rulings warrants further review. They represent a proper application of this Court's agency fee decisions to the facts of this case, establish no new principles of federal law, and are not in conflict with the rulings of a federal court of appeals or another state court of last resort.

I. THE NEW JERSEY SUPREME COURT CORRECTLY APPLIED THE TEACHINGS OF *ABOOD* AND *ELLIS* TO THE REALITIES OF NEW JERSEY'S PUBLIC SECTOR LABOR RELATIONS IN CONCLUDING THAT THE ACT'S AUTHORIZATION OF THE USE OF REPRESENTATION FEES FOR THE DEFINED EMPLOYMENT-RELATED LOBBYING IS NOT UNCONSTITUTIONAL ON ITS FACE.

This Court's decisions establish that it is constitutional to require members of a bargaining unit, over their objection, to support union activities that are related to collective bargaining. As this Court put it in *Ellis v. Railway Clerks, supra,* at 1892:

> [W]hen employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Petitioner does not directly address the New Jersey Supreme Court's application of the foregoing standard to the employment-related lobbying authorized by the New Jersey Act. Discussing the issue only in the most abstract and general terms, she asserts simply that "[t]he very process of lobbying the government to make or change law constitutes speech on 'matters of public concern . . . at the heart of the First Amendment's protection.'" Petition at 13. What petitioner appears to be suggesting is that the crucial distinction for constitutional purposes is the forum in which the expenditure is made rather than the subject matter. But there is nothing in *Ellis* or any of this Court's other representation fee decisions to support this position. Indeed, the teaching of these decisions is precisely to the contrary.

This Court has recognized that employees may "seek to improve working conditions through resort to" various forums, including specifically "appeals to legislators to protect their intersts as employees. . . ." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978). Although unions in both the public and private sectors engage in lobbying to further the interests of the employees whom they represent, resort to the legislative forum is especially important in the public sector because of the extent to which the conditions of public employment are controlled by statute. As this Court noted in *Abood*, "[t]he process of establishing a written collective bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." 431 U.S. at 236.

The New Jersey Supreme Court took account of this practical reality, and after an examination of collective bargaining in New Jersey, concluded that the employment-related lobbying authorized by the New Jersey Act is a necessary part of that state's public sector labor relations system:

The statute's broad recognition of lobbying activities as an essential element of public employee union activity accurately reflects the significant quantum of public employee rights and benefits that are determined outside the collective-negotiation process. Public employees in New Jersey are substantially affected by state and local budgetary decisions and by the various laws and regulations that determine conditions of employment as much as, if not more than, by the negotiations conducted by their majority representative. Indeed, many of the most important benefits of public employment are determined by statute and a public employee union that ignored this reality would not represent properly the members and nonmembers in its bargaining unit. *See Abood, supra*, 431 U.S. at 227-32, 97 S.Ct. at ——, 52 L.Ed. 2d at 279-81; C.W. Summers, "Public Sector Bargaining: Problems of Governmental Decisionmaking," 44 Cin. L. Rev. 669 (1975). Respondent unions can readily identify a number of state statutes that directly affect conditions of employment for public school teachers and that would appear to be likely subjects for lobbying activity. *See, e.g.*, N.J.S.A. 18A:66-1 to -192 (Teachers Pension and Annuity Fund); N.J.S.A. 18A:28-1 to -17 (tenure); N.J.S.A. 18A:6-30 and -30.1 (compensation for wrongful suspension or discharge); N.J.S.A. 18A:27-1 to -13 (hiring, contracts, evaluation of nontenured teachers, continuation and termination of employment, and authorization of school board rules governing employment of teachers); and N.J.S.A. 18A:30-1 to -8 (sick leave and work related disabilities). App. 25a-26a.[3]

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[3] Statutes and regulations that establish conditions of employment in the New Jersey public sector often are incorporated by reference into collective bargaining agreements, *New Jersey v. State Supervisory Employees Ass'n*, 78 N.J. 54, 393 A.2d 233, 246 (1978), and made subject to the agreement's grievance procedure, *Township of West Windsor v. PERC*, 78 N.J. 98, 393 A.2d 255, 264 (1978). Thus, not only are New Jersey public employees bound by such statutes and regulations, but public employee unions also become responsible for enforcing their provisions through

The New Jersey Supreme Court then turned to this Court's decisions in *Abood* and *Ellis*, and summarized the lesson to be drawn from those decisions in the following terms:

> As the United States Supreme Court noted in *Ellis* and *Abood*, any requirement that a nonunion member pay a fee to the union impinges upon that individual's first amendment rights of free speech and association. That impact is constitutionally permitted only when the fee is used for objectives germane to collective negotiations or conditions of employment, because the collection of nonmember fees for these purposes promotes the governmental interest in achieving stability in labor relations. App. 27a.

Declaring that its "obligation is to construe the [New Jersey] statute in a manner that is not repugnant to first-amendment protections," the court below held "that the lobbying activities authorized by N.J.S.A. 34:13A-5.5 must be germane to policy goals in collective negotiations and contract administration or to advantages in wages, hours, and other conditions of employment in order to invoke the State's interest in achieving stability in public-employee labor relations," App. 28a. And it unanimously concluded that, "[a]s construed, . . . the statute is not facially invalid . . .," App. 29a, a conclusion that falls squarely within the four walls of *Abood* and *Ellis*.

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the contractual grievance procedure. *See Lullo v. Fire Fighters Local 1066*, 55 N.J. 409, 262 A.2d 268 (1970).

It is, moreover, a common practice in the New Jersey public sector for unions and employers to include in their collective bargaining agreements a provision requiring joint union-employer lobbying efforts to secure statutory or regulatory changes that may be a precondition to the implementation of other provisions in the agreement, and this practice has been approved by the New Jersey courts. *See Policemen's Benevolent Ass'n v. PERC*, 187 N.J. Super. 202, 453 A.2d 1373 (App. Div. 1982), *cert. denied*, 93 N.J. 269, 460 A.2d 672 (1983).

This is not the first time that this Court has been asked to review a lower court's determination that the lobbying provision of the New Jersey Act promotes the state's interest in labor peace and stability and does not unnecessarily burden the first amendment rights of objecting employees. In *Robinson v. State of New Jersey*, 741 F.2d 598 (3d Cir. 1984), the 3rd Circuit considered the same constitutional challenge that is asserted here. This Court denied certiorari, —— U.S. ——, 105 S. Ct. 1228.

The holding in *Robinson* is consistent with that in *Champion v. State of California*, 738 F.2d 1082, 1085-86 (9th Cir. 1984), in which the 9th Circuit sustained the facial constitutionality of a provision in the California State Employer-Employee Relations Act, Cal. Gov't. Code, §§ 3515.7(a) *et seq.*, authorizing a union to use the representation fees of objecting employees for the same type of employment-related lobbying as does the New Jersey Act. This Court likewise denied certiorari in *Champion*, —— U.S. ——, 105 S.Ct. 1230 (1985).

The only other case in which a court of appeals has considered whether a union may use the representation fees of objecting employees for lobbying is *Beck v. Communication Workers*, 120 LRRM 2957 (Oct. 24, 1985). In *Beck*, the 4th Circuit affirmed the decision of the district court approving a special master's disallowance of the Communications Workers of America's (CWA) expenditure of objecting employees' fees for "labor legislation" pursuant to a union security provision negotiated under § 8(a)(3) of the Labor Management Relations Act. *Beck* was decided after petitioner had filed her Petition for Certiorari in this case, and she filed a Supplemental Brief, asserting that the decision of the 4th Circuit creates an "obvious split in the circuits on this vital issue of First Amendment concern." Supplemental

Brief at 2.[4] This assertion is incorrect, for, as we now show, *Beck* is totally compatible with *Robinson* and *Champion*, as well as with the decision of the court below in the instant case.

In sustaining the position taken by the special master *vis-a-vis* CWA's expenditures for "labor legislation," the 4th Circuit commented as follows:

> This disallowance was based on two grounds: First, he found that in large part these expenditures covered costs of 'lobbying efforts' by CWA 'far remote . . . from collective bargaining, contract negotiation and grievance adjustment,' for instance, 'lobbying efforts on behalf of the adoption of the Panama Canal Treaty, and the Equal Rights Amendment.' He suggested that there might have been some areas such as 'the Telecommunications Act or Occupational Health and Safety Regulations' where 'lobbying' would have some relevance, but the special master said CWA had made no effort to identify any such permissible 'lobbying activities' or to offer any evidence in support. The disallowance seems justified under *Abood*. 120 LRRM at 2975.

As the foregoing summary makes clear, the special master established (and the 4th Circuit endorsed) essentially the same dividing line between chargeable and non-chargeable lobbying as did the New Jersey Supreme Court in this case, the 3rd Circuit in *Robinson*, and the 9th Circuit in *Champion*. The counterpart language by the court below is as follows:

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[4] Although *Beck* was a private sector case, in which the precise issue was whether the expenditures in question were appropriate under the statutory standard set forth by Congress in the Labor Management Relations Act, the 4th Circuit stated that "[t]he disallowance seems justified under *Abood*," 120 LRRM 2975, which, according to petitioners, indicates that it found these expenditures impermissible as a matter of first amendment law. For purposes of the textual analysis, it is assumed that the 4th Circuit was in fact applying a constitutional standard.

> The more removed the objectives of such lobbying are from collective negotiations or conditions of employment [*e.g.*, 'the adoption of the Panama Canal Treaty, and the Equal Rights Amendment'] the less likely it is that such lobbying activities can be financed by involuntary nonmember fees. As the United States Supreme Court noted in *Ellis* and *Abood*, any requirement that a nonunion member pay a fee to the union impinges upon that individual's first-amendment rights of free speech and association. That impact is constitutionally permitted only when the fee is used for objectives germane to collective negotiations or conditions of employment [*e.g.*, 'the telecommunications Act or Occupational Health and Safety Regulations'], because the collection of nonmember fees for these purposes promotes the governmental interest in achieving stability in labor relations. App. 27a.

And in *Robinson*, the 3rd Circuit indicated that objecting employees could only be charged for lobbying expenditures that "are pertinent to the duties of the union as a bargaining representative and are not used to advance the political and ideological positions of the union," 741 F.2d at 609.

In sum, the New Jersey Supreme Court, the 3rd Circuit, the 9th Circuit, and the 4th Circuit all tracked this Court's analysis in *Abood* and *Ellis* in distinguishing between chargeable and non-chargeable lobbying. Although the special master disallowed all of the lobbying expenditures in *Beck*, he did so because "CWA had made no effort to identify any such permissible 'lobbying activities' or to offer any evidence in support." 120 LRRM at 2975. The ability of the union to meet its evidentiary burden is, of course, not a relevant consideration here, since, as the New Jersey Supreme Court noted, "[i]n the context of this facial challenge to the Act, we do not now attempt to

forecast the various objectives of lobbying activities that will or will not meet this standard." App. 28a.[5]

There is no need to belabor the point. Neither *Abood*, *Ellis*, nor any other representation fee decisions of this Court or any federal court of appeals supports the proposition that a union categorically is prohibited from expending representation fees, over objection, for lobbying. The proposition that these decisions *do* support was aptly set forth by the 3rd Circuit in *Robinson*, when it stated that:

> So long as the lobbying activities are pertinent to the duties of the union as a bargaining representative and are not used to advance the political and ideologi-

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[5] Petitioner does not in her Supplemental Brief even refer to the distinction recognized in *Beck* between employment-related and non-employment-related lobbying, or to the fact that the decision in that case turned on CWA's failure to demonstrate that its lobbying expenditures fell on the chargeable side of the line. Petitioner states simply that the 4th Circuit "disallow[ed] as a matter of law the entire category of 'labor legislative expenditures'," Supplemental Brief at 4, and then, in support of this disingenuous statement, quotes as follows from a footnote in the court's opinion:

> In *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), the court appears to have sustained "lobbying" expenditures by public employees because of the unique relationship of public employees' working conditions, wages, etc. to legislation. *It is not easy to reconcile this decision [with] Abood.* Supplemental Brief at 4, citing *Beck*, 120 LRRM at 2975, n.31 (emphasis added).

Although the underscored sentence suggests that the 4th Circuit may not fully have appreciated the narrowly-defined range of employment-related lobbying approved by the 3rd Circuit, the significance of this comment for present purposes is in any event undercut by the final sentence of the footnote, which petitioner fails to quote. This sentence reads as follows:

> However, we are not here concerned with public employees and the unique considerations which influenced the decision in *Robinson* are not present here.

It is, of course, these same "unique considerations" of public sector labor relations that inform the decision of the New Jersey Supreme Court in this case.

> cal positions of the union, lobbying has no different constitutional implication from any other form of union activity that may be financed with representation fees. 741 F.2d at 609.

The New Jersey Act reflects this teaching, and is not facially unconstitutional because it authorizes a union to expend the representation fees of objecting employees for a narrowly defined range of employment-related lobbying. Accordingly, this aspect of the New Jersey Supreme Court's decision does not warrant review by this Court.

II. THE NEW JERSEY SUPREME COURT WAS CORRECT IN CONCLUDING THAT, UNDER THE ACT AS CONSTRUED, IT IS POSSIBLE FOR A UNION TO DEVELOP A CONSTITUTIONALLY ACCEPTABLE DEMAND-AND-RETURN SYSTEM.

At the threshold, it bears emphasis that the New Jersey Supreme Court did not rule on the adequacy of any particular demand-and-return system. Because "the demand-and-return system in evidence . . . was repealed before oral argument, and the replacement system is not in the record before us," the court below viewed petitioner's challenge as "limited to the facial validity of the statutory provisions requiring the adoption of a demand-and-return system." App. 31a. Accordingly, the question that the court below addressed, and unanimously answered in the affirmative, was whether it was possible to construe those provisions in a manner that would enable a union to develop a constitutionally adequate demand-and-return system.

The New Jersey Supreme Court considered the facial validity of the challenged provisions "in the context of first-amendment guarantees." App. 13a. Referring specifically to the concern expressed by this Court in *Abood* and *Ellis*, it construed the New Jersey Act as prohibiting a "pure rebate approach," which would allow a union "annually to expend nonmember representation fees for political lobbying activities not permitted by the statute

and thereafter to refund the portion of the fee improperly expended upon demand by an objecting nonmember." App. 29a, 32a. In order for a demand-and-return system to pass muster under the Act, the court stated, the maximum fee charged to an objecting employee "for the current year would be an amount equal to membership dues reduced by the percentage of impermissible expenditures in the prior year's budget [but] [i]n no event may the nonmember fee exceed 85% of the dues charged to members." App. 33a, n.5. The court recognized, however, that this reduction might not, in and of itself, be sufficient for a demand-and-return system to satisfy the requirements of the Act, and stated that "[r]efinements of the statutory demand-and-return system can undoubtedly be devised to reduce even further the risk of unconstitutional uses of nonmembers fees," citing by way of illustration this Court's reference in *Ellis* to "the adoption of interest-bearing escrow accounts. . . ." App. 33a. Additionally, the court below observed that:

> The demand-and-return system itself, beyond the statutory requirement that the burden of proof be on the majority representative, must provide an uncomplicated, efficient, and readily accessible process for contesting the representation fee. Such a process must contain no features or conditions that would in any manner inhibit or restrain a nonmember from utilizing it. App. 34a.

The New Jersey Supreme Court concluded that the requirements for demand-and-return systems expressly set forth in the New Jersey Act itself, as "[s]upplemented by the procedural safeguards that we have determined are required to achieve the legislative purpose of the Act," App. 34a, are sufficient to prevent the unconstitutional use of the fees of objecting employees during the pendency of challenges to the amount collected.[6] It held,

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[6] In *Robinson*, the 3rd Circuit concluded that the demand-and-return systems implemented by the defendant unions "incorporate

therefore, that no first amendment problems are presented by these provisions of the New Jersey Act.

Petitioner makes no attempt to dispute this holding. Instead, she shifts ground, arguing that regardless of whether the demand-and-return systems required by the New Jersey Act are sufficient to protect first amendment rights of free speech and association, the due process clause requires more to protect adequately the "liberty and property interests" of objecting employees. Petition at 17. Petitioner puts her argument this way:

> [The New Jersey Supreme Court] left the burden upon the non-union employee, rather than the government or union, to come forward and take lengthy steps to protect *her liberty and property interests.*

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both of the protective mechanisms approved in *Ellis*"—*i.e.*, by statute, there is a fifteen percent "advance reduction" and "each of the defendant-unions has created an escrow system for a portion of the representation fee." *Id.* at 612. Under the New Jersey Act, as construed by the court below, the advance reduction is not simply 15%—it is rather "the percentage of the union's prior year's budget attributable to expenses that the law prohibits the union to charge to [dissenting] nonmembers," but "[i]n no event may the nonmember fee exceed 85% of the dues charged to members." App. 33a, n.5. Nor is the escrow account necessarily limited to "a portion of the [reduced] representation fee." The court below indicates only that "the adoption of interest-bearing escrow accounts [are] a means of preventing the actual use of nonmembers funds during the pendency of challenges to proposed expenditures," App. 33a, which does not preclude the possibility that the court may, when confronted with a challenge to the validity of a specific demand-and-return system, construe the New Jersey Act as requiring that an objector's entire fee be placed in escrow, and prohibit any expenditure of that money until the objector has the right to a full evidentiary hearing before the appeal board and/or the state courts.

Moreover, the construction that the New Jersey Supreme Court has given to the New Jersey Act moots the constitutional question, raised by the partial dissent in *Robinson*, of whether the 15% advance reduction required by the Act would by itself be constitutionally sufficient.

> Thus, it denied Petitioner a procedure where there is adequate pretaking notice to affected individuals and where the union must *factually establish* the validity of its mandatory fees before a neutral governmental body prior to any deductions. *Id.* (first emphasis added).

In short, the fatal defect in the decision of the court below, according to petitioner, is that it did not construe the New Jersey Act to require a *pre*-collection governmental determination of the amount that may be expended over objection.

Before addressing petitioner's due process argument on its own terms, we note that the result she seeks—*i.e.*, the functional equivalent of an injunction against the collection of any fees *pendente lite*—would uproot a principle of representation fee law that has been firmly established by this Court's decisions. This Court has made it abundantly clear that the one remedy that is not appropriate in representation fee cases is an injunction that relieves objecting employees of the obligation to provide *any* fiscal support to the union that represents them. As this Court explained almost twenty-five years ago in *Machinists v. Street*, 367 U.S. 740, 771 (1961), an injunction restraining fee collection:

> sweeps too broadly . . . [and] might well interfere with the . . . union's performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry.

This position was reaffirmed in *Railway Clerks v. Allen*, 373 U.S. 113, 119 (1963) ("an injunction relieving dissenting employees of all obligation to pay the monies due under a [union security] agreement . . . was impermissible."). And in *Abood*, even though the Michigan statute at issue had been construed by the state court as providing objectors with no protection against use of their fees for partisan political purposes, 431 U.S. at

232-233, this Court held that the Michigan court was correct in denying broad injunctive relief, *id.* at 240-41.[7] Yet the import of petitioner's present argument is that if an objector invokes "liberty and property interests" under the due process clause, the union is precluded from collecting *any* money from that objector unless and until it has "*factually establish*[ed] the validity of its mandatory fees before a neutral governmental body. . . ." Petition at 17 (emphasis in original).

Petitioner's argument also flies in the face of this Court's analysis in *Ellis*. After indicating that a union is prohibited from "exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place" (*i.e.*, a "pure rebate approach"), the *Ellis* Court identified two alternative procedures that would be constitutionally acceptable:

> [T]here are readily available alternatives [to a pure rebate approach] such as advance reduction of dues and/or interest-bearing escrow accounts, that place only the slightest additional burden, if any, on the union. 104 S.Ct. at 1890.

Inasmuch as one of these *constitutionally acceptable* alternatives—*i.e.*, interest-bearing escrow accounts—presupposes that the determination by "a neutral governmental body" of the amount that may be charged to objecting employees will take place *after* collection, it would, under petitioner's theory, become *constitutionally unacceptable* whenever an objector asserts a due process claim.

In short, the clear teaching of this Court's representation fee jurisprudence is that a pre-collection govern-

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[7] There is, of course, nothing to prevent a state from deciding, on policy as opposed to constitutional grounds, to deny a union access to any portion of the objectors' fees until after a governmental hearing has taken place, either by requiring a 100% escrow or otherwise. *Cf.*, n.6, *supra*; *School Committee of Greenfield v. Greenfield Ed. Assn.*, 385 Mass. 70 (1982), *infra*, at p. 20.

mental determination of the amount that may be charged to objecting employees is *not* a *sine qua non* for a constitutionally acceptable demand-and-return system, and no federal or state appellate court ever has held otherwise. To the extent petitioner cites *Hudson v. Chicago Teachers Union*, 743 F.2d 1187 (7th Cir. 1984), *cert. granted*, 105 S.Ct. 2700 (1985), and *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 79-82 (1982), for a contrary proposition, she is mistaken.[8]

In *Hudson*, after finding that "[t]he procedure that the defendants adopted in this case is constitutionally inadequate," the 7th Circuit indicated that "they must go back to the drawing board" and offered the following "guidance" as to the type of procedure that, in its opinion, would be constitutional:

> [W]ithout wanting to be dogmatic or to foreclose consideration of alternative procedures, we suggest that the constitutional minimum would be fair notice, a prompt administrative hearing before the Board of Education or some other state or local agency—the hearing to incorporate the usual safeguards for evidentiary hearings before administrative agencies—and a right of judicial review of the agency's decision. 743 F.2d at 1196.

At oral argument, the union's counsel informed the 7th Circuit that "after this case was brought the union

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[8] It is not entirely clear whether petitioner is in fact contending that the 7th Circuit or the Massachusetts Supreme Judicial Court held that a pre-collection determination is constitutionally required. Petitioner simply states that:

> [In these cases] the courts focused expressly on the constitutional duty of government to provide an advance determination of an assessment by a governmental decisionmaker. These decisions advance the salutary purpose 'to devise a way of preventing compulsory subsidization of ideological activity' and to avoid the dubious choice to relinquish either one's 'right to withhold' support or 'freedom to maintain [one's] own beliefs.' *Abood*, 431 U.S. at 241, 244.

Petition at 19.

began voluntarily placing dissenters' agency fees in escrow," *id.* at 1197. In response to this information, the court observed:

> This was a step in the right direction but does not make the issue moot. The union has made no commitment to continue to place such fees in escrow. The terms cannot be left entirely up to the union. The union might decide, for example, to forgo a high interest rate in order to punish dissenters (even though it would be punishing itself at the same time). It would be best if the union turned management and not just custody of the account over to a bank or trust company. But we need not go into those details here. It is enough to hold that a proper escrow arrangement is required in order to protect the dissenters' constitutional rights. *Id.*

These comments by the 7th Circuit hardly support petitioner's pre-collection determination argument. For if it were true that representation fees may not be collected until *after* there has been a governmental determination of the amount that constitutionally may be charged to objectors, it would be pointless to consider, as *Hudson* does, the elements of a "proper escrow arrangement."[9]

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[9] Inasmuch as *Hudson* presently is pending before this Court, it is important to point out that there is nothing in the New Jersey Supreme Court's construction of the New Jersey Act that would preclude a union from developing a demand-and-return system that meets the constitutional standards set forth in *Hudson*. The fulcrum of the 7th Circuit's decision was its conclusion that the statute at issue there did not provide for either an administrative hearing before a neutral body or judicial review. 743 F.2d at 1196. In contrast, the New Jersey Act provides for review of the union's calculations by an appeal board appointed by the Governor, and for judicial review of the board's determination. Under the decision of the court below, a union also could establish what the 7th Circuit characterizes as "a proper escrow arrangement"—*i.e.*, one in which "the union turned management and not just custody of the account over to a bank or trust company." In the context of the facial challenge to the constitutionality of the Act, the New Jersey Supreme Court simply identified "interest-bearing escrow accounts as a means of preventing the actual use of nonmember funds during

There likewise is nothing in the *Greenfield* decision to suggest that a pre-collection determination is constitutionally required. To the contrary, the Massachusetts Supreme Judicial Court construed that state's representation fee statute as authorizing objecting employees to pay their fees into an escrow account pending a *post*-collection determination of the appropriate amount. 431 N.E.2d at 189-190.

In an apparent effort to avoid the force of this Court's representation fee precedents, petitioner, in her extended exegesis into due process, simply proceeds as if *Street*, *Allen*, *Abood*, and *Ellis* never had been decided.[10] Relying instead entirely on cases decided in other contexts, petitioner asserts that a " 'root requirement' of the Due Process Clause is 'that an individual be given an opportunity for a hearing *before* he is deprived' of protected interests," and "[t]hat requirement is especially applicable here." Petition at 18 (emphasis in original, citation omitted).

Although petitioner refers to a deprivation of both "liberty and property interests," Petition at 17, 18, the only possible deprivation of liberty that exists in the present context arises not as a result of the *collection* of representation fees, but as a result of the *expenditure* of those fees for impermissible purposes. As previously noted, however, the procedural safeguards that are available under the New Jersey Act as construed by the court below, including both an advance reduction and the possibility of a 100% escrow, are more than adequate to

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the pendency of challenges to proposed expenditures," App. 33a, but made no attempt to indicate the type of account that would be required "to achieve the constitutionally mandated objective." In short, the disposition of *Hudson* will have no bearing on the outcome of this case, and, accordingly, there is no reason for this Court to defer action on the instant Petition pending a decision in *Hudson*.

[10] Except for the inclusion of a reference to Justice Powell's concurring opinion in *Ellis* as part of a string-citation, see Petition at 18, petitioner does not even mention—much less treat with—these cases.

assure that there will be no deprivation of this liberty interest. Simply stated, then, petitioner's position is that the due process clause requires a pre-deprivation hearing whenever an individual is threatened with the deprivation of a property interest—in this case, the loss of the use of $37.08 per month during the ten-month school year. App. 6a. As we now show, this position certainly does not reflect this Court's due process holdings.

In the seminal case of *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court eschewed a fixed mechanical formula for determining in a particular case what due process requires and opted instead for a flexible generalized approach. Following this approach, the post-*Eldridge* cases consistently "reject[] the proposition that [due process] . . . *always* requires the State to provide a hearing prior to the initial deprivation of property," and affirm that "post-deprivation remedies made available by the State can satisfy the Due Process Clause." *Parratt v. Taylor*, 451 U.S. 527, 540, 538 (1981) (emphasis in original). Indeed, subsequent to *Eldridge*, this Court, on at least six occasions, has sustained the constitutionality of a *post*-deprivation hearing absent any *pre*-deprivation process. *Hewitt v. Helms*, 459 U.S. 460 (1983); *Parratt v. Taylor*, *supra*; *Mackey v. Montrym*, 443 U.S. 1 (1979); *Barry v. Barchi*, 443 U.S. 55 (1979); *Dixon v. Love*, 431 U.S. 105 (1977); *Ingraham v. Wright*, 430 U.S. 651 (1977).[11]

The same due process argument that petitioner advances here was advanced in *Robinson*. In rejecting it, the 3rd Circuit commented as follows:

> Even assuming some cognizable harm occasioned by the temporary deprivation of a small amount of returnable fees exists, adequate post-deprivation procedures may suffice to withstand the constitutional

[11] Although *Eldridge* and its progeny are of controlling importance here, petitioner does not even cite *Eldridge*, much less conduct an *Eldridge* analysis.

> challenge. . . . In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court sanctioned the discontinuation of disability benefits prior to a full evidentiary hearing. The Court reasoned that the notice provisions of the challenged social security termination procedure combined with the 'fairness and reliability of the pre-termination procedures,' 424 U.S. at 343 . . ., rendered the likelihood of harm remote and the extent of actual harm, were it to occur, *de minimis*. [Citation omitted].
>
> Based upon *Mathews* and its progeny, we conclude that the constitutional infirmity of the demand and return systems, if any, depends on the adequacy of the return arrangements. . . . [T]he question is one of the due process protections in the assessment of the withholding and the adequacy of the post-withholding return systems. 741 F.2d at 611-612.

And the court of appeals did undertake such an assessment, concluding:

> An examination of the demand and return systems adopted by the defendant unions reveals that the principal protections required by *Ellis* and the *Mathews* due process case law are already in existence. *Id.* at 613.[12]

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[12] This same argument also was advanced and rejected in *Threlkeld v. Robbinsdale Federation of Teachers*, 459 U.S. 802 (1982), *dismissing appeal from* 307 Minn. 976, 239 N.W.2d 437 (1976) and 316 N.W.2d 551 (1982). The issue in *Threlkeld* was whether the Minnesota representation fee statute "deprives an individual of property without providing procedural due process," 239 N.W.2d at 439. Plaintiffs argued there, as petitioner argues here, that "an individual's wages are a 'specialized type of property' and that, under *Sniadach* [*v. Family Finance Corp.*, 395 U.S. 337 (1969)], an individual must be accorded a prior hearing before deductions may be made from his wages," *id.* at 442. The Minnesota Supreme Court rejected plaintiff's contention as follows:

> A prior hearing is not the *sine qua non* of procedural due process since '[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every

The conclusion that the 3rd Circuit reached in this regard is sound, and since the decision of the New Jersey Supreme Court allows for the development of demand-and-return systems that provide for procedural safeguards over and above those provided by the systems of the defendant unions in *Robinson*, petitioner's assertion that the New Jersey Act is unconstitutional because it does not require a pre-collection governmental determination of the amount that may be charged to objecting employees is patently without merit.

In sustaining the facial validity of the demand-and-return system provisions of the New Jersey Act, the court below has issued a ruling that is consistent with the relevant decisions of this Court and the decisions of all other appellate courts that have considered the procedural safeguards to which objecting employees constitutionally are entitled. This ruling does not warrant further review.

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imaginable situation.' *Mitchel v. W.T. Grant Co.*, 416 U.S. 600, 610 (1974). Again, it must be stressed that the procedural protection to which the individual is constitutionally entitled depends on the balancing of the interests in each particular case. . . . As shown herein, the individual property interest in this case is of a much lesser magnitude than was involved in [*Sniadach* and its progeny] and the state's interest in the collection of the [representation] fee is clearly more substantial . . . Consequently, since in the instant case the individual's interest is less significant and the state's interest is more substantial, the demands of procedural due process are correspondingly reduced. *Id.* at 444-45.

The plaintiffs in *Threlkeld* appealed to this Court, arguing in their jurisdictional statement that "even if First Amendment freedoms are not involved, a seizure of property under color of statute without a prior hearing is unconstitutional under the Due Process Clause," J.S. No. 81-2403 at 19-20. This Court concluded that the Minnesota Supreme Court's holding in *Threlkeld* did not raise a substantial federal question.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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